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12 SUPERIOR COURT OF STATE OF ARIZONA  
13 COUNTY OF YAVAPAI

14 **STATE OF ARIZONA,**

15 Plaintiff,

16 vs.

17 **JAMES ARTHUR RAY,**

18 Defendant.  
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**CASE NO. V1300CR201080049**

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES REGARDING EXHIBIT  
735**

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA  
2011 MAR -7 PM 2:17  
CLERK  
BOBBI JO BALL  
BY: \_\_\_\_\_

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The Defense submits this Memorandum to clarify the issues raised at oral argument on  
4 Friday, March 4 regarding Exhibit 735. Mr. Ray's position, as stated in his March 4 motion, is  
5 that the audio recording of Ms. Brown's statement is irrelevant and must therefore be excluded  
6 under Rules 401, 402, and 403. The State cannot establish that the recording is relevant to Mr.  
7 Ray's mental state, the only non-hearsay purpose it has identified. Instead, in arguing to the  
8 Court that the statement is relevant, the State has egregiously distorted both Ms. Brown's words  
9 and their context.

10 According to the State, Ms. Brown's statement is relevant because:

11 "Kirby says that she was so determined to play by Defendant's  
12 rules that when she threw up ('puked'), rather than break  
13 Defendant's rules and go to the restroom, she swallowed her own  
vomit and continued to lay there, suffering and in pain."

14 State's Response to Motion to Exclude Audio Recording, filed Feb. 25, 2011, at 5. Accordingly,  
15 the State suggests, an individual listening to this statement would have believed that Ms. Brown  
16 would have remained in the sweat lodge notwithstanding life-threatening symptoms.

17 Yet the uncontested fact, explained by the State's *own* witnesses, is that JRI rules did *not*  
18 require people to avoid going to the bathroom. Furthermore, contrary to the State's  
19 representation to this Court, Ms. Brown's statement does *not* "say that she was so determined to  
20 play by Defendant's rules" that she decided not to "break Defendant's rules and go to the  
21 restroom." In fact, she does not say a word about Mr. Ray or his rules. Nor would such an  
22 inference be plausible, given that *no such rule existed*.

23 The foundation for the State's theory of relevance is utterly lacking and thus the State  
24 cannot genuinely assert that this recording advances its attempt to prove that Mr. Ray committed  
25 reckless manslaughter. The exhibit is no more than an inflammatory recording of a decedent's  
26 vibrant and enthusiastic voice. And similar to the State's repeated and gratuitous display of the  
27 decedents' photographs to the jury—where identification is not an issue—the State's desire to  
28 play Ms. Brown's voice to the jury is a blatant and improper attempt to inflame the emotions and

1 sympathies of the juries. Rule 403 and Mr. Ray's right to a fair trial require exclusion of Exhibit  
2 735.

3 **II. ARGUMENT**

4 **A. The recording must be excluded as irrelevant.**

5 As noted above, the State's sole argument for the relevance of Ms. Brown's statement is  
6 as follows: "Kirby says that she was so determined to play by Defendant's rules that when she  
7 threw up ('puked'), rather than break Defendant's rules and go to the restroom, she swallowed her  
8 own vomit and continued to lay there, suffering and in pain." State's Response to Motion to  
9 Exclude Audio Recording, filed Feb. 25, 2011 at 5. Accordingly, the State suggests, an  
10 individual listening to this statement would have been on notice that Ms. Brown would have  
11 remained in the sweat lodge notwithstanding life-threatening symptoms. This argument is both  
12 factually and legally baseless.

13 **1. Ms. Brown's statement says nothing about her determination to play**  
14 **by Mr. Ray's supposed "rules."**

15 First, the State mischaracterizes Ms. Brown's statement. She does not say anything about  
16 Mr. Ray's supposed "rule" against using the bathroom. As described below, no such rule existed.  
17 Nor did Ms. Brown make any other reference to Mr. Ray's rules, or to his supposed influence  
18 over her. For the Court's convenience, Ms. Brown's statement is as follows:

19 So, I sang the song 'Rain Rain Go Away Come Again Another Day'  
20 and there was the rainbow. That was great. But to this power piece  
21 that I brought. I really didn't know why I was bringing this, it was  
22 a, it's an old piece that was given to me when I was in third grade  
23 and it sat in my jewelry box for so long and it was - it's an old  
24 Scottish kilt pin from my grandmother's Scottish kilt. She was a  
25 Scottish dancer. And it wasn't because she was so big in my life  
26 that I was bringing her with me, but I just brought it anyway  
27 because that was one of my pieces that I had to bring. And when  
28 we started the game, I was like you, I was like 'I'm going to be the  
29 hero'. You know? And then I died. So quickly, just right there!  
30 [Laughter]. And before it even began! And then I froze to death!  
31 And then I overheated to death and I puked and I swallowed it  
32 down underneath that pillow in there.

33 JAMES ARTHUR RAY Wow.

1 WOMAN #6<sup>1</sup> ... or underneath the blanket and thank God I didn't  
2 puke as much as you did, I have a feeling, but I realized that, first of  
3 all, being so disciplined, you know that was incredible. Because I  
4 was freezing I had to go to the bathroom. I think I was – I puked  
5 because I was in so much pain that I had to go the bathroom so  
6 badly. But I realized that the debtor with us and our loved ones that  
7 have passed are with us. And, so as I laid there dying, underneath  
8 the blanket and everybody was working and you know battling, I  
9 just kept sending my energy to them and also working on not  
10 moving, so I didn't kill one of my fellow people and, and so then  
11 I'm out in my beautiful medicine wheel, and I haven't done much  
12 meditation. This is really the most I've ever done, just the holo-  
13 sync was just this past month, was really the first part. And so, at  
14 one point, I needed to meditate and I did. And a powerful figure  
15 came to me. Brother Leo Kirby, my grandfather's brother, who was  
16 an amazing man and a very powerful priest and he was always my  
17 person that I would go to ask for advice. And he appeared, and I've  
18 missed him, I've missed him and he hasn't been in my writing or  
19 anything. This was nothing in my writing, but he came to me and I  
20 just said, 'oh wow, thanks for coming here.' And do you have any  
21 advice. And he said, I have three words for you, 'Keep things  
22 simple'. And I, I said, that's the same thing he said to me before he  
23 died. And I just hugged him and thanked him and of course he was  
24 in my higher counsel today, in that meditation which I haven't done  
25 before so that was my first, so I didn't even have that going into the  
26 meditation and my medicine wheel. So it was very powerful and  
27 understanding that, you know, our loved ones that have passed are  
28 there with us and we can use them to help and be there.

Transcript of audio recording of Spiritual Warrior seminar, 10/8/09, at 32:18–34:4.

The State's assertion to this Court—that Ms. Brown “says that she was so determined to play by Defendant's rules that when she threw up ('puked'), rather than break Defendant's rules and go to the restroom, she swallowed her own vomit and continued to lay there, suffering and in pain”—State's Response at 5, mischaracterizes and distorts the evidence.

**2. There was no rule prohibiting or discouraging participants from using the restroom during the Samurai game.**

The State's argument also hinges on its false assertion that Mr. Ray instructed participants to not go to the restroom during the Samurai game. That is simply not true. There was no such rule. As witness Melissa Phillips testified extensively on March 2, participants could and did use the restroom facilities during the Samurai game. Jennifer Haley, currently on the witness stand,

<sup>1</sup> The recording does not identify Ms. Brown by name. The Defense assumes for purposes of argument that the State can lay foundation to establish that the speaker was Ms. Brown.

1 has told detectives that “James did not say that they couldn’t go to the bathroom” during the  
2 Samurai game. *See* Transcript of Interview of Jennifer Haley, 12/16/09, at 34:21-58.)

3 Nor would such a prohibition have been consistent with Mr. Ray’s philosophy or  
4 instructions for any other of the Spiritual Warrior events. Before one of the retreat’s breathing  
5 exercises, Mr. Ray instructed as follows:

6  
7 JAMES A. RAY: Rule number three, pee before you start. [Laughter]  
8 And if you don’t think you have to pee, go in there and pretend you have to  
9 pee until you do. [Laughter]

10 Now if by chance, nature calls even after you pee in advance, then  
11 rule number four is, you raise your hand— in fact if you need any  
12 assistance, you raise your hand and stay flat on your back until one of us  
13 comes to assist you. You do not sit up. You do not stand up. You do not  
14 pass go. You raise your hand and you wait ‘til someone comes to assist  
15 you. And I don’t care how stable you think you might be. You’re  
16 straddling two worlds and what you want to do is stay as inner-focused as  
17 possible. So what we will do, no matter how stable you think you might  
18 be—and this is just— it’s non-negotiable—we’ll put your hands on our  
19 shoulders and we will walk you to the bathroom and we’ll wait for you.  
20 And then we’ll walk back and lay you down on your mat. Now, it’s to  
21 your advantage to just let yourself be led and stay inner-focused versus  
22 outer-focused. Because when you do that and you stay in here, then by the  
23 time you get down to your mat, you start breathing again immediately  
24 [Demonstrate breathing].

25 And it won’t take but a couple of minutes if not seconds and boom  
26 you’re gone again. Okay? If you need any other assistance, if you get  
27 cold— I mean we’re really—we would take pristine care of you. That’s a  
28 promise. So if we—if we see you looking cold, we’ll most likely cover  
29 you up. I mean we’ll take as good care of you as you could possibly be  
30 taken care of. However, if you get cold and you want a blanket or you  
31 need some—anything, you know, a drink, okay? You do not get up on  
32 your elbow and get your own drink. You need a drink, you hold your hand  
33 up, and you wait until someone comes to assist you, and we will sit you up  
34 at least halfway and hold your head and help you get a drink and lay you  
35 back down. You want to stay in your inner world as much as possible.  
36 That makes sense, say yes.

37  
38 Transcript of Recording of Spiritual Warrior Retreat, Oct. 5, 2009, at 76:13–77:23.

39 Simply put, Mr. Ray never imposed the rule on which the State’s argument hinges. No  
40 listener in the room, whether Mr. Ray or anyone else, would have believed that Ms. Brown’s  
41 reference to her own “discipline” and the memory of her deceased loved ones had *anything* to do

1 with (non-existent) rules imposed by Mr. Ray. There is nothing other than the State's say-so that  
2 supports its theory of relevance.

3 **3. Ms. Brown's statement has no connection to any relevant mental state**  
4 **of Mr. Ray.**

5 In light of these factual misstatements, the allegedly permissible inference the State has  
6 offered to the Court lacks legal merit. Ms. Brown's words simply do not contain *anything* that  
7 could have conveyed to Mr. Ray or any other listener that Ms. Brown would remain in the sweat  
8 lodge to the point of death. In this regard, although the State need not prove the *truth* of Ms.  
9 Brown's statement, it does need to provide enough context and indicia of meaning to support the  
10 inference that the statement would have affected Mr. Ray's mental state in the manner the State  
11 alleges. The State has not done that and cannot do so for the simple reason that it is not true.

12 **B. The recording must be excluded pursuant to Rule 403.**

13 As noted in the Defense's Motion regarding this exhibit filed on March 4, any scintilla of  
14 probative value in the recorded statement would be outweighed by the prejudicial effect of  
15 admitting the statement. *See* Motion at 4–6.

16 As already noted, there is nothing in Ms. Brown's statement—not a single word—  
17 suggesting that her conduct is any way attributable to Mr. Ray or his (non-existent) rule. Yet Mr.  
18 Ray cannot prevent the jury from assuming the worst—that Ms. Brown was seriously ill because  
19 of something that Mr. Ray did— and cannot correct misconceptions through cross-examination.  
20 The jury is more likely, in other words, to render a decision on “an improper basis, such as  
21 emotion, sympathy, or horror.” *Shotwell v. Donahoe*, 207 Ariz. 287, 296 (2004) (en banc)  
22 (internal quotation marks omitted). This is precisely the type of harm Rule 403 was designed to  
23 protect against. *Id.*

24 **III. CONCLUSION**

25 Because Ms. Brown's recorded statement is irrelevant to the charged crimes, and because  
26 its prejudicial effect would substantially outweigh any probative value it provided, this Court  
27 should exclude Exhibit 735. Nothing that Ms. Brown stated could possibly have put Mr. Ray or  
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1 anyone else in the room on notice of a mental state that would lead to her untimely death on  
2 October 8.

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5  
6  
7 DATED: March 7<sup>th</sup>, 2011

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14 Copy of the foregoing delivered this 7<sup>th</sup> day  
15 of March, 2011, to:

16 Sheila Polk  
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19 by 